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27 May 2015

Version of attached file:

Accepted Version

Peer-review status of attached file:

Peer-reviewed

Citation for published item:

Delgado Casteleiro, Andrés (2014) 'United we stand : the EU and its Member States in the Strasbourg Court.', in The EU accession to the ECHR. Oxford: Hart Publishing, pp. 105-120. Modern studies in European law. (48).

Further information on publisher's website:

<http://www.hartpub.co.uk/BookDetails.aspx?ISBN=9781849465236>

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United We Stand: The EU and its Member States in the Strasbourg Court

Andrés Delgado Casteleiro*

I. Introduction

The accession of the European Union (EU) to the European Convention on Human Rights (ECHR) will mark not only the beginning of a new era in terms of the protection of Fundamental Rights in Europe, but also in terms of the EU's participation in international courts and tribunals. Up until now, the EU has never become a party to an international agreement with such a strong adjudicatory body. Therefore, it can be expected that the EU's accession to the ECHR will have important implications for the common assumptions surrounding the relationship between the EU and adjudicatory decision making of international organisations.¹ Furthermore, it cannot be excluded that the articulation of EU participation in the European Court of Human Rights (ECtHR) will not be replicated in other international agreements with an international court.

Consequently, the examination of the mechanism envisaging the EU's participation in ECtHR proceedings undoubtedly raises many interesting issues as regards the EU's external representation. There are many noteworthy questions concerning the relationship between the Court of Justice of the EU (CJEU) and the ECtHR in institutional and substantive terms. This paper focuses on an institutional matter, namely, the EU's *locus standi* in the ECtHR. More precisely, it examines how the draft Accession Agreement² deals with the participation of the EU in the

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¹ On those views, see: J Klabbers, *The European Union in International Law* (Paris, Pedone, 2012) 69; BI Bonafé, 'Direct Effect of International Agreement in the Eu Legal Order: Does it Depend on the Existence of an International Dispute Settlement Mechanism?' in E Cannizzaro, P Palchetti and RA Wessel (eds), *International Law as the Law of the European Union* (Leiden, Martinus Nijhoff, 2012); P Eeckhout, *EU External Relations Law* (Oxford, Oxford University Press, 2011) 434; M Bronckers, 'The Relationship of the EC Courts with Other International Tribunals: Non-committal, Respectful or Submissive?' (2007) 44 *Common Market Law Review* 601; N Lavranos, *Legal Internation between Decisions of International Organizations and European Law* (Amsterdam, Europa Law, 2004).

² The draft Agreement and its Explanatory Report can be found in the Council of Europe Doc 47+1 (2013) R008, available at

proceedings of the ECtHR; in other words, how the co-respondent mechanism organises the participation of the EU and its Member States in ECtHR proceedings. The current institutional design of the ECHR, and more specifically the way in which the ECtHR works, leads to many problems linked with the future joint participation of the EU and its Member States: the lack of legal certainty as regards the respondent and the lack of unity when pleading or issues concerning the autonomy of the EU's legal order³ create problems in terms of the EU's *locus standi*.

As a way of dealing with these issues, the draft Agreement and more precisely its Explanatory Report enshrine the so-called co-respondent mechanism. This legal device aims at alleviating the different tensions underpinning the accession of the EU, such as the different views on the division of competences, the autonomous nature of the EU legal order and the problems of legal certainty that the EU's participation can entail. However, a closer look at the co-respondent mechanism will show that certain gaps in accountability would still remain after the EU's accession. This chapter will proceed with this examination in three parts. First, it assesses how the co-respondent mechanism deals with the main interests affecting EU participation in the ECtHR. Second, it shows how the principles that govern the relations between the EU and its Member States affect their participation in the proceedings in front of the ECtHR. More specifically, it builds on recent developments in the case law of the CJEU on the duty of cooperation. Third, it examines whether the EU's participation in other international court proceedings can give us some clues as to how the duty of cooperation might operate when pleading in Strasbourg. More precisely, the issue of joint participation in front of other international courts will undoubtedly shed some light on how the EU and its Member States will act in the Strasbourg Court. In this regard, the chapter concludes that the design of the co-respondent mechanism could pose some problems as regards the autonomy of EU Member States when pleading in front of the ECtHR. It critically concludes that, although innovative, the co-respondent mechanism can restrict the autonomy of EU Member States in front of the ECtHR.

II. The Co-respondent Mechanism: Proceduralising the Problems

[www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1\(2013\)008_final_report_EN.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1(2013)008_final_report_EN.pdf).

³ For an extensive discussion on the issue of the EU's autonomy and the accession to the ECHR, see A Torres Pérez, ch 3 in this edited collection.

A. Organising Principles of the Co-respondent Mechanism

The main reason behind the necessity of a special mechanism dealing with EU intervention stems from both the way in which the EU will accede to the ECHR and the *sui generis* nature of the EU. On the one hand, both the EU and its Member States will be party to the ECHR. The EU will not replace the Member States, so the division of competences and the allocation of responsibilities as regards the ECHR become blurred. This becomes especially relevant when speaking about responsibility and *locus standi*. If the division of competence is not settled, it becomes difficult to know who is going to be *prima facie* responsible and consequently who will plead in Strasbourg.

While formally the ECHR is not going to differ significantly from any other mixed agreement in terms of negotiation, conclusion and ratification, the institutional design of the ECHR, and more specifically the way in which the ECtHR functions, has the potential to intensify some of the problems linked to mixity.⁴ The co-respondent mechanism would aim at alleviating precisely these problems. In this regard, the Explanatory Report to the draft Agreement clearly shows that the co-respondent mechanism is necessary in order to ‘accommodate the specific situation of the EU as a non-State entity with an autonomous legal system that is becoming a Party to the Convention alongside its own member States’.⁵ In other words, the ECHR will be a mixed agreement. Since both the EU and its Member States will be parties, the extent to which both of them are bound and responsible under the ECHR is unclear.

Moreover, the EU implements its *acquis* in quite a complicated manner, indirect administration being the most obvious example. In a nutshell, like other international organisations, the EU relies on its Member States for the application and implementation of EU law.⁶ The decentralised application of EU law is guided by the principle of primacy: all organs of a Member State’s administration—

⁴ On the different issues arising from mixity, see: C-D Ehlermann, ‘Mixed Agreements A List of Problems’ in D O’Keeffe and HG Schermers (eds), *Mixed Agreements* (Deventer, Kluwer Law and Taxation, 1983); NA Neuwahl, *Mixed Agreements: Analysis of the Phenomenon and their Legal Significance* (Florence, European University Institute, 1988); E Neframi, ‘International Responsibility of the European Community and of Member States under Mixed Agreements’ in E Cannizzaro (ed), *The European Union as an Actor in International Relations* (Leiden, Kluwer Law International, 2002); C Tomuschat, ‘The International Responsibility of the European Union’ in E Cannizzaro (ed), *The European Union as an Actor in International Relations* (Leiden, Kluwer Law International, 2002).

⁵ Explanatory Report, para 38.

⁶ J Klabbers, *An Introduction to International Institutional Law* (Cambridge, Cambridge University Press, 2009) 279. HG Schermers and NM Blokker, *International Institutional Law: Unity Within Diversity* (Leiden, Martinus Nijhoff, 2003) 958.

executive *and* judicial—must not apply conflicting national law in every individual case before them. From an institutional perspective, national administrations are not integrated into the European administrative machinery.⁷ From a functional perspective, they operate as a decentralised European administration;⁸ they cannot be considered EU organs.⁹ Customs administration constitutes the most obvious example of the EU's executive federalism. Customs falls under the exclusive competence of the EU,¹⁰ yet there are no EU customs administrations. Instead, there are 28 customs administrations which implement the EU customs legislation. Therefore, what happens when one of these authorities breaches a fundamental right (eg, the right to property)? Who should be responsible? Who should stand in front of the ECtHR to defend the compatibility of the action of a customs official?

Moreover, EU law nowadays operates in even more complex ways, in which the principles that govern the relations between EU law and the national realm get diluted. Examples of this could be the European Arrest Warrant, in which a framework decision¹¹ lays down the conditions under which a Member State has the obligation to extradite individuals to another Member State.¹² Thus, could the EU intervene in cases dealing with a European Arrest Warrant?

In this regard, the Explanatory Report acknowledges the 'special feature of the EU legal system that acts adopted by its institutions may be implemented by its member States and, conversely, that provisions of the EU founding treaties agreed upon by its member States may be implemented by institutions, bodies, offices or agencies of the EU'.¹³ Therefore, the issue of the implementation of the *acquis* by Member States and

⁷ R Schütze, 'From Rome to Lisbon: "Executive Federalism" in the (New) European Union' 47 (2010) *Common Market Law Review* 1385

⁸ R Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford, Oxford University Press, 2009) 57; PJ Kuijper, 'International Responsibility for EU Mixed Agreements' in C Hillion and P Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Oxford, Hart Publishing, 2010).

⁹ Contra: PJ Kuijper and E Paasivirta, 'Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organizations' (2004) 1 *International Organizations Law Review* 111; F Hoffmeister, 'Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirket v. Ireland' (2006) 100 *American Journal of International Law* 442.

¹⁰ Article 3 TFEU.

¹¹ Council Framework Decision 2002/584 JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, OJ 2002 L190/1.

¹² S Peers, *EU Justice and Home Affairs* (Oxford, Oxford University Press, 2011) 469.

¹³ Explanatory Report, para 38.

the role of the latter in the decision-making process of the EU will also play a relevant role in the co-respondent mechanism.

The joint participation of the EU and its Member States, added to the complexity in which EU law is implemented, could create uncertainty as to who has competence over a certain area, who would be responsible for a specific breach of the ECHR in that area and who would have standing. As a matter of practice, when dealing with complex issues linked to the division of competences in mixed agreements, the EU has tended to proceduralise the matter. Whenever there is some kind of disagreement between the diverging interests underpinning an international agreement, the EU and the other parties to the agreement tend to favour the inclusion of a procedural solution. Instead of establishing clear obligations for all parties, the agreement defers away the obligation into procedures and future decision making.¹⁴ For instance, the EU and its Member States agree on an internal procedure, which solves the issue of competence in most of the aspects of the international agreement. The decision as to the division of competences is postponed to a later stage while assuring the other parties to the agreement that the solution to the issue of competence, responsibility or standing will be rapidly resolved once the procedure is triggered. Declarations of competence made to multilateral environmental agreements¹⁵ or the institutional arrangement dealing with the EU's participation in the FAO are examples of this tendency to lay down procedures dealing with the EU's participation in a mixed agreement.¹⁶

These concerns on the division of powers and the legal uncertainty that creates can also be found in Article 1 Protocol n° 8 of the Lisbon Treaty. The protocol, which deals with the EU accession to the ECHR, provides that:

‘The agreement relating to the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the ‘European Convention’) provided for in Article 6(2) of the Treaty on European Union shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to:

¹⁴ M Koskeniemi, ‘Theory: Implications for the Practitioners’ in British Institute of International and Comparative Law (ed), *Theory and International Law: An Introduction* (London, British Institute of International and Comparative Law, 1991) 13. In fact, as Koskeniemi points out, this trend is not exclusive from the EU. It is a common trend in international law-making and is especially present in Multilateral Environmental International Agreements.

¹⁵ A Delgado Casteleiro, ‘EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?’ (2012) 17 *European Foreign Affairs Review* 4, 491–510.

¹⁶ A Delgado Casteleiro, ‘The International Responsibility of the EU: Between Pragmatism and Proceduralization’ (2012-2013) *Cambridge Yearbook of European Legal Studies* 15..

[...] (b) the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate.’

The protocol and by extension EU Member States are concerned that the mixed character of the ECHR can lead to the incorrect targeting of the EU or its Member States. EU Member States would want to avoid being responsible for acts committed by the EU. In this regard, legal certainty works in two directions. The mechanism should give the individual bringing the claim certainty that somebody will be held responsible for the violation of the ECHR, while at the same time it gives EU Member States certainty that they will not be held liable for acts which they are not responsible. Put differently, Member States wanted to avoid similar scenarios to the *Senator Lines* case.¹⁷ In this case, the claimant (Senator Lines) argued that a fine imposed by the European Commission, applying EU competition law violated articles 6 and 13 of the ECHR. Since the EU was not a party to the ECHR, Senator Lines brought the case against the EU Member States. Eventually, the ECtHR declared the application inadmissible, due to the fact that the European Commission had annulled the fine. After the EU’s accession, a similar case would endanger the autonomy of EU Legal order. The EU Member States would be obliged to comply with a judgement that tells them to stop applying EU legislation. However since the EU would not be bound by the judgment, if the Member States comply with the ECtHR judgment they would be in breach of EU law and vice versa.¹⁸ Furthermore, a case resembling *Senator Lines* would also create potential problems regarding the vertical division of powers. The Member States would be held responsible for an action of the European Commission. Yet, given the vertical division of powers in the EU, the Member States have no powers in this area. They cannot annul or stop complying with a decision of the Commission unless the CJEU has annulled it. Therefore, the EU Member States, after having being held responsible by the ECtHR, would need to bring either an infringement action or an

¹⁷ *Senator Lines GmbH v Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom*, App No 56672/00 (2004). See also, in relation to Eurocontrol, *Bovin v 34 Member States of the Council of Europe*, App No 73250/01 (2008).

¹⁸ T Lock, ‘End of an Epic? The Draft Agreement on the EU’s Accession to the ECHR’ (2011) 31 *Yearbook of European Law* 162; JM Cortés Martín, ‘Adhesión al CEDH y Autonomía del Derecho de la Unión: Legitimación pasiva de la Unión y sus miembros y compatibilidad material’ (2010) 22 *Revista General de Derecho Europeo* 53; JA Pastor Ridruejo, ‘La interrelación de los sistemas de protección de los derechos fundamentales’ in E Álvarez Conde and V Garrido Mayol (eds), *Comentarios a la Constitución Europea*, vol 2 (Valencia, Tirant Lo Blanch, 2005).

annulment action against the Commission.¹⁹ Obviously, this would put EU Member States' compliance with the ECtHR outside of their control. They cannot simply disregard the Commission decision without a prior CJEU decision, which can take years.

The co-respondent mechanism envisages a procedure which tries to deal with such issues as a lack of legal certainty on the question of who should be liable for violations of the Convention or the autonomy of the EU legal order understood both as the independent legal personality of the EU and the division of competences.²⁰ In this regard, Article 36(4) ECHR as modified by the draft legal instrument provides that:

The European Union or a member State of the European Union may become a co-respondent to proceedings by decision of the Court in the circumstances set out in the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms. A co-respondent is a party to the case. The admissibility of an application shall be assessed without regard to the participation of a co-respondent in the proceedings.

This provision enshrines a procedure by which the EU and the Member States will jointly participate in the proceedings brought against any of them. The aim of this procedure, as mentioned before, is to create a balance between the *sui generis* nature of the EU and legal certainty for the parties to the proceedings. As the Explanatory Report shows, the co-respondent mechanism is 'a way to avoid gaps in participation, accountability and enforceability in the Convention system'. The mixed participation of the EU and its Member States combined with the complex nature of the EU's legal system could lead to gaps in responsibility,²¹ which in this context means gaps in the protection of fundamental rights in Europe. Consequently, the co-respondent mechanism establishes that the EU and/or its Member States will take part in the proceedings whenever the compatibility between an EU law instrument and a provision of the ECHR is called into question.²²

Furthermore, the protocol expresses another concern usually linked with the mixed participation in international agreements: the encroachment of competences by

¹⁹ Article 259 TFEU.

²⁰ In more general terms, see J Heliskoski, *Mixed Agreements as a Technique for Organising the International Relations of the European Community and its Member States* (Leiden, Kluwer Law International, 2001) 19.

²¹ cf R Collins and ND White, 'Moving Beyond the Autonomy-Accountability Dichotomy: Reflections on Institutional Independence in the International Legal Order' (2010) 7 *International Organizations Law Review* 1.

²² Article 3(2) of the draft Agreement.

the EU through practice. Article 2, Protocol No 8 provides that: ‘The agreement referred to in Article 1 shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions.’

This kind of statement can also be found in other recent arrangements regarding the participation of the EU and its Member States in international organisations. More precisely, in a recent arrangement concerning EU statements in multilateral organisations (the arrangement), the following disclaimer was added: ‘The adoption and presentation of statements does not affect the distribution of competences or the allocation of powers between the institutions under the Treaties. Moreover, it does not affect the decision-making procedures for the adoption of EU positions by the Council as provided in the Treaties.’²³

The protocol, like the arrangement, put forward the concern of certain Member States with regard to the implications that the external representation of the EU has on the internal division of powers.²⁴ To deal with all these concerns, the draft Agreement establishes a new model of proceduralisation of the EU’s participation in international agreements. So far, most of the procedures have been of an internal nature. They have either been internal arrangements between the different institutions of the EU or instruments with international legal effects, albeit unilateral and internal in nature.²⁵ As a general rule, procedures addressing the EU’s participation in international agreements were not included in the body of such agreements. They were required by the agreement, but they were considered an internal matter of the EU. The co-respondent mechanism breaks with this trend to a certain extent, since it appears that further internal rules on the EU’s participation in the ECtHR are being discussed in the EU Council of Ministers.²⁶

Moreover, it appears that the responsibility of the EU and its Member States will be joint unless they decide otherwise.²⁷ Consequently, when the co-respondent mechanism is triggered, both the EU and at least one of its Member States will stand in front of the ECtHR to defend the compatibility of their actions with the provisions of

²³ Council Document 15901/11.

²⁴ See European Scrutiny Committee, *House of Commons. Fifty-fourth Report*, available at www.publications.parliament.uk/pa/cm201012/cmselect/cmeuleg/428-xlix/42802.htm On a more general level and theoretical level, see Heliskoski (n 20).

²⁵ cf Delgado Casteleiro (n 15) 491.

²⁶ Lock (n 18) 169.

²⁷ Article 3(7) of the draft Agreement.

the ECHR. In addition, depending on the nature of the EU legal act called into question, the co-respondent mechanism lays down different procedures.

B. Scenarios that Trigger the Co-respondent Mechanism

The co-respondent mechanism establishes two different procedures depending on whether the breach stems from an EU primary norm (ie, the Treaties) or from a secondary norm (ie, regulations, directives, etc.). It lays down a procedure to involve the EU or its Member States depending on the type of act which caused the violation of the ECHR. If the breach stems from an EU primary norm, a different procedure will apply than if the breach stems from an EU secondary provision. By allowing the EU and/or its Member States to act as co-respondents, the draft Agreement tries to ensure, as pointed out before, that there will not be gaps in responsibility. However, a closer look at the co-respondent mechanism shows that certain gaps in accountability would still remain after the EU's accession. This section is divided into three parts. First, it will examine how the co-respondent mechanism operates in cases in which the validity of EU primary law is put into question. The second part focuses on the validity of EU secondary norms, while the third examines other situations in which EU law can appear in an incidental manner.

i. Breach of the ECHR by Primary Law

To deal with breaches of the ECHR stemming from EU primary norms, ie, the Treaties, Article 3(3) of the draft Agreement provides that:

Where an application is directed against the European Union, the European Union member States may become co-respondents to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the Convention rights at issue of a provision of the Treaty on European Union, the Treaty on the Functioning of the European Union or any other provision having the same legal value pursuant to those instruments, notably where that violation could have been avoided only by disregarding an obligation under those instruments.

The co-respondent mechanism thus tries to deal with situations like the one that occurred in *Matthews*.²⁸ The co-respondent mechanism recognises that in those cases in which the breach stems from a rule enshrined in a treaty, it is necessary to hold the Member States liable. The liability of the Member States would ensure that the treaty

²⁸ *Matthews v United Kingdom*, Series A 24833/94, (1999) 28 EHRR 36; Lock (n 18) 171.

provision would be modified following Article 48 of the Treaty on European Union (TEU).²⁹ However, this provision raises many questions as regards its practical application. For instance, the responsibility of the EU in this scenario, while symbolic, is not justified by a coherent legal doctrine of attribution of responsibility.³⁰ First, if there is an incompatibility between a provision of the ECHR and a provision of the EU Treaties, the Member States were the ones that negotiated, agreed, signed and ratified that incompatibility in the first place. Therefore, it would make sense to hold them liable. Second, since the Member States are the driving force behind any treaty modification, to hold them responsible alongside the EU for a breach stemming from a treaty provision would be redundant. Third, the EU comprises its Member States, especially in situations in which the compatibility of EU law with international law is put into question. Article 216(2) of the Treaty on the Functioning of the European Union (TFEU) clearly recognises this when it states that agreements concluded by the EU are binding upon the institutions of the EU and on its Member States. Moreover, the CJEU has extended this provision to apply to the decisions of the bodies set by those agreements.³¹

However, it is the exact scope of EU–Member State intervention that casts doubt on the practical functioning of the co-respondent mechanism in this scenario. First, given the rationale underpinning the mechanism, it would be expected that all EU Member States would have to act as co-respondents. Even though this is not entirely clear in the draft Agreement and the Explanatory Report, it would be the only way to ensure that there were no gaps in responsibility.³² However, as will be further explained below, the voluntary nature of the mechanism³³ does not guarantee this result. More precisely, a hypothetical judgment of the ECtHR in this scenario would most likely fall within the scope of Article 48(6) and (7) TEU. By virtue of this provision, unanimity in the European Council is a *conditio sine qua non* to reform the Treaties.³⁴ Thus, if a

²⁹ X Groussot, T Lock and L Pech, *Adhésion de l'Union européenne à la Conventions européenne des droits de l'homme: analyse juridique du projet d'accord d'adhésion du 14 de octobre 2011* (Brussels, Question d'Europe, 2011) 13.

³⁰ Lock (n 18) 172.

³¹ Case 181/73 *Haegeman* [1974] ECR 449; Case 12/86 *Demirel* [1987] ECR 03719; Case C-192/89 *Sevince* [1990] ECR I-3461.

³² Lock (n 18) 171.

³³ Article 3(2)–(3) of the draft Agreement.

³⁴ K Lenaerts and P van Nuffel, *European Union Law* (London, Sweet & Maxwell, 2011) 79.

Member State does not join the proceedings, there are no assurances that the treaty reform that would lead the conflict with the ECHR being solved will take place.

By way of an example, in a situation like *Matthews*, all the Member States would be invited to join. However, there is the possibility that certain Member States might decide not to join the proceedings. For instance, in a case similar to *Matthews*, it would be rather unlikely that Spain would join the proceedings as a co-respondent. Spain already expressed its unease to the previous *Matthews* case by bringing an action to the CJEU against its implementation.³⁵ By not joining the other EU Member States as co-respondents, Spain would avoid being internationally bound to renegotiate a part of the EU Treaties it does not want to compromise on. Consequently, in this scenario, the co-respondent would not effectively fill the gap in responsibility because of its voluntary nature.

Second, the wording of the co-respondent mechanism as regards breaches stemming from EU primary law seems to adopt a narrow approach to the situations in which these kinds of breaches might arise. The co-respondent mechanism rightly reflects that the most likely scenario in which this kind of situation might arise will be in cases brought against the EU. However, it cannot be excluded that a breach of primary EU law might also arise in proceedings brought against EU Member States. Yet neither paragraph 2 nor paragraph 3 of Article 3 of the draft Agreement allows EU Member States to become co-respondents in actions brought against other EU Member States. So, should that claim be declared inadmissible *ratio personae*? Taking into account that the ECtHR allows individuals to bring cases without the need of legal counsel and how the EU's executive federalism dilutes the visibility of EU law, it would create an unfair burden on the individual if her claim is declared inadmissible and has to bring a new one. For instance, an individual could see her case declared inadmissible because it was not able to identify that her fundamental rights were violated not only by the Member State she is bringing the case against but also by a provision of the EU Treaties.

Overall, the co-respondent mechanism deals with most of the situations in which a breach of the ECHR might stem from a provision of EU primary law. However, the voluntary nature of the mechanism can create problems as regards the reparation of the

³⁵ Case C-145/04 *Spain v United Kingdom* [2006] ECR I-7917.

wrongful act. Also, the co-respondent mechanism does not allow certain possibilities, such as permitting EU Member States to act as co-respondents in actions brought against other EU Member States, which could place an extra burden on the claimant. The narrow wording of the provision combined with the voluntary nature of the mechanism cast some shadows over the practical effectiveness of the co-respondent mechanism.

ii. Breach of the ECHR by Secondary Law

Article 3(2) of the draft Agreement enshrines the way in which the EU and its Member States will participate in those proceedings in which the compatibility of EU secondary legislation with the ECHR is called into question. The paragraph reads as follows:

2. Where an application is directed against one or more member States of the European Union, the European Union may become a co-respondent to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the Convention rights at issue of a provision of European Union law, notably where that violation could have been avoided only by disregarding an obligation under European Union law.

The provision provides, *inter alia*, for the participation of the EU in proceedings brought against its Member States when they implement EU secondary legislation. In this regard, the Explanatory Report makes reference to the specific example of EU executive federalism as one of the reasons for the adoption of the co-respondent mechanism.³⁶ Member States implement EU regulations and directives on a daily basis. Therefore, questions on responsibility and *locus standi* in those situations are likely to appear in front of the Strasbourg Court.³⁷ Nevertheless, the provision is also designed to cover other situations. The use of the expression ‘provision of European Union Law’ also gives the EU the possibility to intervene in proceedings in which EU primary law is called into question. The Explanatory Report explicitly mentions this possibility.³⁸

However, the broad scope for EU participation in these kinds of scenarios is not matched by the participation of Member States. It could be argued that the participation of EU Member States is not necessary in this case, since it is only the EU that can solve the incompatibility. In this respect, the participation of the EU is necessary in order to fill any gap in responsibility. Despite the logic underpinning the co-respondent

³⁶ Explanatory Report, para 38.

³⁷ *ibid*, para 50.

³⁸ *ibid*, para 49.

mechanism, there are some issues concerning the internal coherence of paragraph 2, especially as regards the role of the Member States. Two comments need to be made in this respect.

First, if the participation of the EU is necessary in order to solve the issue of the compatibility of an EU secondary norm and the ECHR, is the presence of the EU Member States really necessary? The co-respondent mechanism does not provide for any exit once it has been initiated.³⁹ Neither the Member States nor the EU can leave the proceedings once the ‘correct’ party has joined them. If **the EU is the only one that** can put an end to the breach of the ECHR, why should an EU Member State continue to be a respondent? It is submitted that this situation places the EU Member State identified in an unequal situation. Since the other EU Member States cannot join proceedings brought against other Member States,⁴⁰ why should the Member State targeted continue to be a part of the case, and not the others? Furthermore, the Explanatory Report slightly shows this inconsistency. According to the Report, Article 3(2) of the draft Agreement would apply ‘if an alleged violation could only have been avoided by a member State disregarding an obligation under EU law (for example, when an EU law provision leaves no discretion to a member State as to its implementation at the national level)’.⁴¹ Therefore, if no discretion is left to the Member States, it can be assumed that not only the Member States against which the case is being brought is violating the ECHR, but also the other 27. Hence, why this differentiated approach?

Second, the draft Agreement includes in Article 3(7) a rule concerning the responsibility under the co-respondent mechanism. The paragraph reads as follows:

If the violation in respect of which a High Contracting Party is a co-respondent to the proceedings is established, the respondent and the co-respondent shall be jointly responsible for that violation, unless the Court, on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, decides that only one of them be held responsible.

The provision establishes the joint responsibility of the co-respondents as the general rule of responsibility. Leaving aside general considerations about joint responsibility and given the design of the co-respondent mechanism, establishing the joint responsibility of the EU and the Member State(s) which is a party to the proceedings

³⁹ It only provides for a change of status from respondent to co-respondent: Article 3(4) of the draft Agreement.

⁴⁰ See above, section II.B.i.

⁴¹ Explanatory Report, para 48.

would seem a bit uneven for two main reasons. First, joint responsibility would be non-existent if the individual would only have targeted the EU. Since EU Member States cannot join all the proceedings as co-respondents,⁴² there might be a situation in which identical facts could lead to different responsibilities.⁴³ Identical facts could lead to either the EU's exclusive responsibility or joint responsibility of the EU and a Member State depending on who the individual initially targeted. Second, if we assume that joint responsibility is necessary to strengthen the effectiveness of the judgment, then the other Member States which are not co-respondents should also bear the responsibility. This becomes especially relevant in those situations in which there was no discretion for the EU Member States. These concerns show how joint responsibility within the co-respondent mechanism has no legal foundations behind it. It has been assumed to be the easy solution as regards responsibility within the ECHR, but the drafters have not really thought about its position within the overall structure of the mechanism.

Moreover, these deficiencies in the mechanism have the potential to create legal uncertainty not only for the individual affected by the breach of the ECHR but also as regards the EU Member States. Consequently the proposed internal rules should really spell out the role of the Member States in the co-respondent mechanism well.

iii. Heterodox EU Law and the Co-respondent Mechanism

The Explanatory Report explains that the reasons for the adoption of the co-respondent mechanism model are rooted in the *sui generis* nature of the EU:

It is a special feature of the EU legal system that acts adopted by its institutions may be implemented by its member States and, conversely, that provisions of the EU founding treaties agreed upon by its member States may be implemented by institutions, bodies, offices or agencies of the EU. With the accession of the EU, there could arise the unique situation in the Convention system in which a legal act is enacted by one High Contracting Party and implemented by another.⁴⁴

In spite of this, EU law nowadays (and especially since the Treaty of Lisbon) does not always operate on the basis of the same principles which gave the EU legal order its autonomous character. The Common Foreign and Security Policy (CFSP) would be a good example in this regard. To what extent would the actions of the EU Member States

⁴² They can only join those proceedings involving primary EU law: Article 3(3) of the draft Agreement.

⁴³ It could be argued that even though the responsibility of the other subjects has not been declared, that responsibility would still exist nevertheless. However, the precise content, limits and scope of that responsibility are left to the ECtHR to determine. On the different perspectives on the rules on responsibility, see J D'Aspremont, ch 6 in this edited collection.

⁴⁴ Explanatory Report, para 38.

by virtue of a CFSP provision fall within the scope of the co-respondent mechanism? EU principles like primacy or direct effect seem not to apply in this part of the EU legal order.⁴⁵ Moreover, the CJEU lacks jurisdiction over this policy.⁴⁶ Therefore, it seems plausible to argue that in principle, the actions of the EU Member States falling within the CFSP would not be covered by the co-respondent mechanism. A previous version of the draft Agreement seemed to point in that direction. Article 59(bb) of the ECHR as amended by Article 1 of the draft Agreement would have read as follows:

[A]cts and measures are not attributable to the European Union where they have been performed or adopted in the context of the provisions of the Treaty on European Union on the common foreign and security policy of the European Union, except in cases where attributability to the European Union on the basis of European Union law has been established by the Court of Justice of the European Union.⁴⁷

This article created plenty of concerns as regards accountability and legal certainty. As a response, the European Commission assured the other parties that ‘this rule would not have as effect to exclude any acts taken under the Common Foreign and Security Policy from the Court’s jurisdiction but only to identify to whom the act is attributable’.⁴⁸ Nevertheless, some High Contracting Parties were not convinced by the EU’s statement.⁴⁹ The ECtHR’s lack of jurisdiction over the CFSP would be very difficult to argue once the EU is a High Contracting Party to the ECHR. If the acts falling within the CFSP could be attributed to the EU, does it mean that these actions are attributable to its Member States? As a result, the Explanatory Report tries to clarify the situation by drawing a parallelism for the first pillar and equating the implementation of the CFSP with the implementation of EU law.⁵⁰ Therefore, by assimilating the CFSP into more orthodox EU legislation, the draft Agreement solves the question of whether the CFSP would fall within the scope of the co-respondent mechanism.

Conversely, some aspects in the area of freedom, security and justice are going to fall outside the scope of the co-respondent mechanism. More specifically, those aspects linked with mutual recognition, and judicial cooperation will not be covered by the co-respondent mechanism. In these areas the EU only lays down a framework in

⁴⁵ cf Eeckhout (n 1) 478; G de Baere, *Constitutional Principles of EU External Relations* (Oxford, Oxford University Press, 2008) 201.

⁴⁶ Article 275 TFEU.

⁴⁷ This version of the agreement can be found in the Report of the Second Negotiation Meeting between the Ad hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights. 47+1 (2012) R002, 15.

⁴⁸ 47+1(2012) R02, 1, para. 5.

⁴⁹ *ibid.*

⁵⁰ Explanatory Report, para 23.

which the Member States operate. EU Member States do not implement EU law *stricto sensu* in these areas. This is reflected in the Explanatory Report:

It is understood that a third party intervention may often be the most appropriate way to involve the EU in a case. For instance, if an application is directed against a State associated to parts of the EU legal order through separate international agreements (for example, the 'Schengen' and 'Dublin' agreements and the agreement on the European Economic Area) concerning obligations arising from such agreements, third party intervention would be the only way for the EU to participate in the proceedings. The issue of the EU requesting leave to intervene will be dealt with in separate Memoranda of Understanding between the EU and the concerned States, upon their request.⁵¹

Even in these scenarios, the EU would have a say as a third party instead of as a co-respondent. Whereas there should not be a problem with leaving these areas outside the co-respondent mechanism and allowing the EU to intervene as another third party, the fact that they will also be left outside the cross-referral procedure between the ECtHR and the CJEU might be seen as problematic. The Explanatory Report links the possibility to refer an ongoing case in the ECtHR to the CJEU to those cases in which only the validity of the EU instrument is put into question.⁵² Therefore, these scenarios would not be covered by the co-respondent mechanism or the cross-referral procedure, but perhaps in certain cases a potential interpretation of the CJEU might be required nonetheless.⁵³

This section has shown how the draft Agreement and its Explanatory Report try to lay down a procedure to deal with the EU's participation in the ECtHR. The establishment of the co-respondent mechanism tries to ensure respect for the division of competence between the EU and its Member States while at the same time giving legal certainty to the individual involved in the proceedings. Nevertheless, the mechanism is not very successful in taking into account these two interests. On the one hand, the voluntary nature of the participation casts some doubts on the ex ante willingness of the EU and its Member States to assume their responsibilities under the ECHR. On the other hand, the mechanism should be more exhaustive in dealing with the different ways in which EU law could interact with the ECHR. Even though it is pointless to advance an alternative to the co-respondent mechanism,⁵⁴ it is submitted that the further

⁵¹ *ibid.*

⁵² Article 3(6) of the draft Agreement.

⁵³ C Eckes, 'EU External Representation in Context: Accession to the ECHR as the Final Step Towards Mutual Recognition' in S Blockmans and RA Wessel (eds), *Principles and Practices of EU External Representation* (The Hague, CLEER Working Paper 2012/5 2012) 109.

⁵⁴ See Gaja, ch 22 in this edited collection.

developments of the mechanism either externally or through internal rules are necessary so as to provide a right balance between legal certainty and the autonomy of the EU legal order.

III. The Principle of Unity in External Representation and the Voluntary Nature of the Mechanism

3.1 The Voluntary Nature of the EU's Participation in the Proceedings

As already mentioned in the previous sections, one of the main flaws of the co-respondent mechanism is its voluntary character. Article 3(2) and (3) of the draft Agreement points in this direction when using expressions like 'the European Union may become a co-respondent' and 'the European Union member States may become co-respondents'. In the same vein, Article 3(5) provides that, *inter alia*: 'A High Contracting Party shall become a co-respondent either by accepting an invitation by the Court or by decision of the Court upon the request of that High Contracting Party.' The wording of all these provisions denotes the idea that the High Contracting Parties have the last word as to becoming co-respondents. Regardless of whether they actually bear responsibility for the violation, the EU and/or its Member States can avoid being held responsible by simply not joining the proceedings. This is confirmed by the Explanatory Report, which clearly states that:

No High Contracting Party may be compelled against its will to become a co-respondent. This reflects the fact that the initial application was not addressed against the potential co-respondent, and that no High Contracting Party can be forced to become a party to a case where it was not named in the original application.⁵⁵

The voluntary nature of the co-respondent mechanism raises many concerns. On the one hand, while it preserves the autonomy of the EU legal order,⁵⁶ it can potentially create uncertainty as to who is going to intervene in the proceedings. Allowing the EU and its Member States to decide whether to join can create inconsistencies as regards their expected intervention, since they might decide that for a specific case, it is better not to

⁵⁵ Explanatory Report, para 53.

⁵⁶ S Vezzani, 'L'Unione europea e i suoi Stati membri davanti ai giudici di Strasburgo: una valutazione critica del meccanismo del co-respondent', 2012, www.sidi-isil.org/wp-content/uploads/2012/10/Simone-Vezzani-LUnione-europea-e-i-suoi-Stati-membri-davanti-ai-giudici-di-Strasburgo-una-valutazione-critica.pdf.

intervene. Furthermore, as highlighted above, the voluntary nature of the mechanism can put its effectiveness at risk, especially in those cases in which unanimity is needed.

In a nutshell, the voluntary nature could also negatively affect the unity of the external representation of the EU and the coordination within the ECtHR. Since EU Member States are not obliged by the co-respondent mechanism, they could decide not to join the proceedings based on their own national interests. In this regard, it is argued that the duty of cooperation will play a fundamental role in the relationship between the EU and its Member States in the ECtHR.

B. The Duty of Cooperation and the Co-respondent Mechanism

Two issues will be discussed in this section: first, how the duty of cooperation would operate when the co-respondent mechanism is triggered; and, second, the implications during the proceedings. It is argued that, in the absence of any internal arrangements, the duty of cooperation has the potential to solve most of the problematic issues concerning the participation of the EU in ECtHR proceedings.

i. Voluntary Nature as a Matter of International Law: Voluntary Nature as a Matter of EU Law?

Whereas the voluntary nature of the co-respondent mechanism as a matter of international law is beyond doubt, as a matter of EU law, it is not that clear. Eckes rightly points out: ‘what is certain is that the EU’s accession to the ECHR is susceptible of entailing different and further-going duties for the Member States under EU law than the Member States’ own participation entails under international law’.⁵⁷ Hence, it could be argued that the Member States would have an obligation to intervene as matter of EU law. Regardless of the voluntary nature of the mechanism, the mixed nature of the ECHR and more precisely the unity of external representation of EU could limit the extent to which EU Member States can refuse to join the mechanism. In this regard, some recent CJEU cases would support this argument. For instance, the Court of Justice held in *Etang de Berre* that:

Since the Convention and the Protocol thus create rights and obligations in a field covered in large measure by Community legislation, there is a Community interest in

⁵⁷ Eckes(n 53) 120.

compliance by both the Community and its Member States with the commitments entered into under those instruments.⁵⁸

By assimilating a mixed agreement to a pure EU agreement,⁵⁹ the Court not only expanded its interpretative jurisdiction over areas not covered by EU competence, it also showed that in mixed agreements, the relations between the EU and its Member States are not regulated by international law, but rather by internal law.⁶⁰ Moreover, the special relation that the EU and its Member States have when implementing mixed agreements can impose stringent obligations on EU Member States that could also mean that they have to exercise their autonomous treaty-making powers. In the *Berne Convention* case,⁶¹ the Court recognised that Ireland had failed in its obligations under EU law by not signing the Berne Convention, an agreement to which the EU was not a member due to its lack of competence on the issue.⁶² In this regard, it has been argued that there is an EU interest in ensuring the implementation of mixed agreements in their entirety, regardless of the competence involved.⁶³

Therefore, inter alia, it could be argued that within the framework of the ECHR and its co-respondent mechanisms, EU Member States have an obligation as a matter of EU law to intervene in the co-respondent mechanism when invited to do so by the ECtHR. In this regard, a negative response would cast some doubts over their willingness to comply with the ECHR, which would go against the interests of the EU. This would become especially relevant in those cases in which the participation of a Member State is needed, such as those in which the compatibility of the ECHR with EU primary norms is at stake. Thus, the duty of cooperation would, to a certain extent, limit Member States' autonomy in deciding whether to intervene or not in a specific case. Moreover, the Commission could bring an infringement action against EU Member States for their decision not to intervene as a co-respondent.

⁵⁸ Case C-239/03 *Commission v France (Étang de Berre)* [2004] ECR I-9325 [29].

⁵⁹ P Koutrakos, 'Interpretation of Mixed Agreements' in Hillion and Koutrakos (n 8) 123.

⁶⁰ M Cremona, 'Defending the Community Interest: The Duties of Cooperation and Compliance' in M Cremona and B de Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (Oxford, Hart Publishing, 2008) 148.

⁶¹ Case C-13/00, *Ireland v Commission (Berne Convention)* [2002] ECR I-2943.

⁶² Cremona (n 60) 147.

⁶³ E Neframi, 'The Duty of Loyalty: Rethinking its Scope Through its Application in the Field of EU External Relations' (2011) 47 *Common Market Law Review* 333.

ii. A Single Voice in Strasbourg

Besides limiting the scope of Member States' autonomy as to their decision to join the EU as a co-respondent, the duty of cooperation would also apply when pleading in the ECtHR. The duty of cooperation would not only ensure that a Member State becomes a co-respondent, it would also limit their autonomy on what exactly to plead.

Following well-established case law,⁶⁴ the joint participation of the EU and its Member States in the ECtHR proceedings will undoubtedly require close cooperation and coordination. In this regard, this close cooperation would usually entail that EU Member States would not be allowed to deviate from the previously agreed EU position. In this particular scenario, this will entail not to argue differently from what the EU has argued. This could become a problematic issue given that the interests of the EU and its Member States could differ greatly.

IV. Concluding Remarks

This chapter has tried to show the current way in which the draft Agreement and its Explanatory Report deal with the EU's participation in the ECtHR's proceedings; it has yet to strike the right balance between the different interests involved, mainly the autonomy of the EU legal order and legal certainty. In this respect, the co-respondent mechanism aims at proceduralising the issue. This fact has two main consequences: first, it postpones the solution to the conflict between the diverging interests to a later stage; and, second, any solution to this conflict or balance would be contextualised, ie. it would not be in principle possible to draw general conclusions on it. Whereas this managerial approach could be a good way to deal with mixed participation in international agreements,⁶⁵ the specific shape that it takes in the draft Agreement raises plenty of legal questions.

The co-respondent mechanism, with its voluntary nature and joint responsibility, gives pre-eminence to the concerns over the autonomy of the EU legal order and the

⁶⁴ Case C-246/07 *Commission v Sweden (PFOS)* [2010] ECR I-03317; Case C-266/03 *Commission v Luxembourg (Inland Waterways)* [2005] ECR I-06985; Case C-433/03 *Commission v Germany (Inland Waterways)* [2005] ECR I-04805; Case C-45/07 *Commission v Greece (IMO)* [2010] ECR I-00701; *Opinion 1/94 Competence of the Community to conclude international agreements concerning services and the protection of intellectual property* [1994] ECR I-05267.

⁶⁵ Heliskoski (n 20).

concerns on legal certainty by the individuals suffering from human rights violations. Inasmuch as the co-respondent mechanism allows the EU and its Member States to decide whether or not to join proceedings against the other, that decision would always have to be approached on an ad hoc basis which cannot be generalised, leading to uncertainty as to whether in similar situations the outcome for the co-respondent would be the same. It is submitted that another way to strike this balance is needed. Even joint participation in all cases (which would have no legal foundations whatsoever) would seem to be a better solution than leaving the decision to intervene (and to be held responsible) to the discretion of the EU and its Member States.

This chapter has also argued that insofar as there are not yet internal arrangements on the participation in the ECtHR, the duty of cooperation would play a very big role in this. Furthermore, in the absence of internal arrangements, the duty of cooperation could solve some of the problems entailed by joint participation. However, a duty does not entail a legal obligation, so it cannot be considered the panacea to apply in the absence of clear legal rules.